United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. **74-1933**

VERMONT MARBLE COMPANY,
Plaintiff-Appellee

VS.

WACO SCAFFOLD & SHORING COMPANY,
DIVISION OF BLISS & LAUGHLIN
INDUSTRIES, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the District of Vermont
Honorable James S. Holden, Chief U.S.D.J.

PLAINTIFF-APPELLE'S BRIEF

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ISSUES

1. Are the Findings of Fact clearly erroneous?

2. Is the judgment supported by the Findings?

STATEMENT OF THE CASE

1. The Defendant-Appellant has outlined the nature of the case and its progress (Appellant's Brief Pages 2, 3)

2. The Plaintiff-Appellee relies on the Findings of Fact made by the Trial Court as giving a fair statement of the facts relevant to the issues (J.A. 51-60) and does not adopt the Defendant-Appellee's interpretation of the testimony. (Defendant's Brief Pages 3-16)

ARGUMENT

I. THE HOLDING THAT THE OLDENBURG LETTER CONSTITUTED AN OFFER WHICH WAS ACCEPTED BY THE NAVARI LETTER, CONSUMMATING A CONTRACT MUTUALLY BINDING ON THE PARTIES, WAS CORRECT.

A. The Oldenburg letter was an offer.

The Defendant WACO in its Brief, Page 16, 17, advances the proposition that the Oldenburg letter dated August 23, 1968 (J.A. 53) was not an offer, but merely a step in the preliminary negotiations between the parties. In making the claim the Defendant chooses to ignore a previous letter from VM dated August 13, 1968 in which Mr. Richardson wrote Mr. Oldenburg expressing VM's interest in the general pricing information submitted by WACO and concluded by stating:

> "Further, we will be having a meeting with the general contractor on the Albany project, for which I gave you some preliminary drawings, and if you could give us your quotation by return mail it would be of assistance to us in our negotiations with this contractor. (P's. Ex. 7, Finding 5, J.A. 53)

This was clearly a solicitation of an offer to do the job for a determined price.

On August 22, 1968, Richardson called Oldenburg to find out if he had completed a proposal. Oldenburg gave a verbal quotation of $10,000.00 only. This was confirmed by the letter from Oldenburg to Richardson dated August 23, 1968:

> "In regard to our phone conversation on the 22nd of August, the job at Capitol Hill-Twin Towers, Albany, New York, the price I quote you of $10,000.00 included the following:
>
> Erection
> Dis-mantling
> 1 Intermediate Change
> Over-head Protection
> Duration of Job
>
> If there is any further information you need regarding this, or any further breakdown, please feel free to call on me." (P's. Ex. 1, Finding 6, J.A. 53)

It is common knowledge that when a contractor is negotiating with an owner or a general contractor for a contract to do a job and said contractor needs part of the work done by a sub-contractor or a sub-sub-contractor, a statement by a sub-contractor of a "bid" or a "price" constitutes an offer by the sub-contractor to do the job for a specified amount of money. Even an unsolicited letter by a sub-contractor which

was sent to contractors who were possible bidders for a State School renovation project and which letter quoted a price for furnishing and installing kitchen equipment has been held to be an offer which was accepted when the contractor incorporated the price in its bid. When the contractor uses the sub-contractor's figure in computing its own bid, it binds itself to perform in reliance on the sub-contractor's terms. Therefore, when the contractor informs the sub-contractor that the main contract has been awarded, the contract is complete. Jaybe Construction Company vs. BECO, INC., 3 Conn. Cir. 406, 216 A.2d 208, 211 (1965).

It would be a deviation from normal conduct and normal understanding to hold, as Defendant WACO claims, that the Oldenburg letter was not a firm offer to do the job for a price. Common procedure is illustrated in Bachli vs. Holt, 124 Vt. 159, 163, 200 A.2d 263/ 2660 (1964) In Bachli the general contractor furnished a plumbing and heating engineer as sub-contractor with drawings and specifications for the plumbing and heating details. There were conversations and a meeting between the sub-contractor and the architect. After these negotiations, the sub-contractor

submitted his "bid" to the general contractor in the form of a letter stating a price for the work. The Court held:

> "It was the Defendant who called upon the Plaintiff to submit a bid for the plumbing and heating contract. When the Plaintiff complied in his letter of August 23, 1968 he made an offer to the Defendant to perform the work specified at the price given." (124 Vt. at 163) (Emphasis supplied)

Preliminary negotiations and solicitation of WACO's offer took place prior to the Oldenburg letter. VM had done business with WACO before (Tr. 9). Oldenburg solicited VM's business by initiating a telephone call to Richardson (Tr. 10). Oldenburg came to Vermont to talk to Richardson to give him a catalog with rough price information (Tr. 11, 12). Richardson informed Oldenburg of the Twin Towers project and told Oldenburg of VM's estimate of $30,000.00 and Oldenburg offered to give VM a quotation (Tr. 16). Richardson advised Oldenburg that the footage then discussed would probably be the same in the final bid figures (Tr. 16). Oldenburg stated he wished to go back to Chicago and prepare a figure there and took with him some plans (Tr. 23). Oldenburg examined plans at VM's office in Proctor, Vermont (Tr. 204). It was accepted practice for VM to rely on such a letter as Oldenburg letter when VM made a

contract for the sale and installation of its marble facing and VM did rely on Oldenburg letter in this case. (Tr. 38, 39)

B. Navari's letter was an acceptance and not a counter-offer.

When VM used WACO's figure in computing its own bid, VM bound itself to perform in reliance on WACO's terms. Notice by VM to WACO that VM had been awarded the contract and that VM had included WACO's figure in its overall bid constituted acceptance and there was a binding contract. Jaybe Construction Company vs. VECO, INC., 3 Conn. Cir. 406, 216 A.2d 208, 210, 211 (1965).

The phrase "duration of the job" in the Oldenburg letter of August 23, 1968 (J.A. 53) did not mean that there was no contract unless the job started within six months as now claimed by WACO (WACO's Brief 21, 22).

Oldenburg was examined in reference to his letter of August 13, 1968 (P's. Ex. 7, J.A. 53) and there was the following exchange:

> "A. Yes, sir. What part do you want to read?
>
> CROSS EXAMINATION RESUMED BY MR. HAUGH;
>
> Q. Just the last part of your handwriting.
>
> A. "$10,000.00, duration of the job."
>
> Q. Would you bid $10,000.00?
>
> A. Duration of the job.

Q. Duration of the job. It doesn't say anything about ballpark does it?

A. No, sir.

Q. What is "duration of the job" mean?

A. Until the contractor is done with it.

Q. That doesn't mean five months or four months, it means until the job is finished?

A. Right, sir." (Tr. 268, 269)

WACO was in the business of renting scaffolding. "Duration of the job" meant that its equipment would stay at the job until the job was finished and was not subject to be removed to another job.

WACO did not make any request for any finding that its offer was subject to be cancelled by reason of any condition relative to time schedule. There was no evidence of any such condition.

Oldenburg made his offer without any prior requirement as to any specific date as to when the job would start or how long it would last. Having worked for Vermont Marble Company himself and being in the scaffolding business he drew his own conclusion. On cross examination of Mr. Oldenburg there was the following exchange:

"Q. Now, with respect to your letter of August 23, 1968, to Mr. Richardson, I am going to ask you, again, did you make any assumptions about how long the job was to last?

A. I had no idea how long the job would last. I only assumed on what I have known from the business and how long it would take to set a job.

Q. What did you assume?

A. I figured probably four, five months, the Summer months,because it wouldn't go into the Winter months." (Tr.236)

"Findings of Fact shall not be set aside unless clearly erroneous,and due regard shall be given to the opportunity of the Trial Court to judge of the credibility of the witness." F.R.C.P. 52(a)

"The question for the Appellate Court under Rule 52(a) is not whether it would have made the findings the Trial Court did, but whether, 'on the entire evidence it is left with a definite and firm conviction that a mistake has been committed'."

Zenith Radio Corporation vs. Hazeltine Research, 395 U.S. 100, 23 L.Ed.2d 129, 148, 89 S.Ct. 1562 (1969).

There could be no mistake as to the findings in the absence of any evidence of any firm pre-conditions as to the commencement and duration of the job.

C. The offer in the Oldenburg letter was accepted within a reasonable time.

What is a reasonable time is a question of fact, depending on the nature of the contracts proposed, the usages of the business and other circumstances of the case which the offeree at the time of his acceptance either knows or has reason to know. Chain vs. Wilhelm, 84 F.2d 138, 141 (1936) (citing Restatement of the Law Contracts §40 (2))

An Appellate Court is not required to search the record for evidence to form a basis on which to reverse the judgment. Gould vs. Gould, 110 Vt. 324, 331, 6 A.2d 24, 27 (1939)

Defendant WACO in its Brief (Page 31) complains that VM was notified on February 9, 1969 that the subcontract for setting of the marble on the CTT project would be awarded to it but VM contacted another scaffolding company for a quotation and did not notify WACO of acceptance until the Navari letter of April 16, 1969 (FS. 8-10 at JA 53-54) but the Defendant does not point to any evidence or any findings which would indicate that the timing of the acceptance letter was in any way a deviation from expected or normal practice or that it caused any prejudice to WACO. In fact, Oldenburg had previously been

informed by Richardson that the job was not going to start until June of 1969. (WACO's Brief, Page 21, Tr. 100)

"A reasonable time" does not mean "as soon as possible" 17 Am.Jur.2d, Contracts, §330, Page 766.

There is no showing that the Trial Court did not consider the subject matter of the contract, the situation of the parties, their intention and what they contemplated at the time the contract was made and the circumstances attending the performance when the Court reached the conclusion that acceptance was within a reasonable time.

Despite the requirement for separate statement (F.R.C.P. 52), the Appellate Court in appropriate cases may treat factual determinations as findings although labeled conclusions. Featherstone v. Barash, 345 F.2d 246, 250, 251 (10th Cir., 1965)

II. WACO WAS NOT DISCHARGED FROM PERFORMANCE OF ITS CONTRACT BY REASON OF ANY ALLEGED LACK OF NECESSARY COOPERATION ON THE PART OF VM.

The Defendant WACO claims that it was not required to erect its scaffolding at the time originally estimated and therefore should be excused from any obligation to erect it at all. The authorities cited by the Defendant do not support this proposition. In Mansfield vs. New York Central and H.P.R.R. Co., 102 N.Y. 205, 6 N.E. 386, 390 (1886) there was a written contract in which the contractor agreed to commence the erection of an elevator within five days after notice from the owner's engineer that the foundations were ready and to complete the same, ready for use within five months thereafter. It does not appear from the opinion that the owner had expressly promised to have the foundations ready at any particular time. The owner gave notice to the contractor to commence work but the contractor complained that the foundations were not ready. The contractor nevertheless commenced work within five days

after receipt of the notice in accordance with the contract. The Court observed that although the written contract did not affirmatively say that the owner promised to have the foundations ready, that was a necessary implication and the contractor did not waive that requirement by commencing work.

Restatement of the Law of Contracts §274, cited by the Defendant (Defendant's Brief Page 34, 35) provides that in promises for an agreed exchange, any material failure of performance by one party not justified by the conduct of the other discharges the latter's duty to give the agreed exchange even though his promise is not in terms conditional. This may be true as an abstract proposition but it has no application to the case at bar because there is no evidence that VM promised or had the ability to promise that WACO's work would commence, without fail, at any particular time.

In Defendant WACO's Requests for Findings of Fact (Requests 15 and 16, JA 18) the Defendant stated only that a scaffolder "must have some estimate of the job duration" and costs depend, among other things, upon the "time frame of the job". There is no request that there be a finding that if the job did

not start in June, 1969, WACO was excused, and VM must find some other contractor.

WACO received its estimate as requested. Richardson estimated the job would commence in June of 1969 and be completed in six months and so informed Oldenburg. It does not affirmatively appear from the transcript when this estimate was given, but the only fair inference to be made in support of the findings and conclusions of the Trial Court would be that the estimate was given to Oldenburg in August of 1968 when Oldenburg visited Richardson seeking a job and would be likely to ask such a question (Tr. 100).

The Defendant in its Brief (Page 36) states that it was "implicit" in the contract that VM would furnish WACO with its scheduling time and the Defendant then states that it was September or October of 1969 when VM first indicated to WACO "any semblance of a schedule of time". (P's. Brief, Page 41) The evidence indicates that VM at all times maintained the position that WACO was going to perform at the contract price of $10,000.00 and supply and erect its scaffolding as soon as VM could proceed with the work. There is no evidence that WACO

notified VM in June of 1969 that WACO refused to perform because the job did not commence at the time estimated. In fact, WACO did not repudiate its contract until January 28, 1970 (Finding 14, JA 57). At that time marble setting had already commenced for a short period between November 10, 1969 and November 26, 1969 when winter weather set in (Finding 13, JA 57).

The Defendant WACO now charges VM with "lack of necessary cooperation". "Necessary cooperation" does not stand out in Defendant's Brief as a separate legal doctrine. It may be most closely likened to a charge of lack of good faith. While every contract implies good faith and fair dealing between the parties exactly what is good faith and fair dealing is a question of fact to be determined on all the circumstances. 17 A C.J.S. Contracts, §630(b) Page 1270; Anderson vs. General Motors Corp., 161 F.Supp. 668, 674 (W.D. Wash. 1968).

III. PERFORMANCE WAS NOT EXCUSED BY THE DOCTRINE OF IMPOSSIBILITY.

Defendant claims that it is excused from performing its contract for $10,000.00 because of "impossibility". (Defendant's Brief Page 47). Defendant relies on Section 454 and 457 of the Restatement of Contracts. Section 454 of the Restatement of Contracts provides:

> "In the Restatement of this Subject impossibility means not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved."

Section 457 of the Restatement of Contracts provides:

> "Except as stated in §455, where, after the formation of a contract facts that a promisor had no reason to anticipate, and for the occurrence of which he is not in contributing fault, render performance of the promise impossible, the duty of the promisor is discharged, unless a contrary intention has been manifested, even though he has already committed a breach by anticipatory repudiation; but where such facts occur after the time when performance of a promise is due, they do not discharge a duty to make compensation for a breach of contract."

In Williams vs. Carter, 129 Vt. 619, 623, 285 A.2d 735, 738 (1971) the Vermont Court limited the doctrine of impossibility as follows:

> "The defendant has advanced a defense of impossibility of performance to avoid payment of the balance. The impossibility he contends for is the failure of his contract arrangement with the Sherburne Corporation. But impossibility of performance is recognized in our law only in the nature of the thing to be done, and not in the inability of the party to do it. Cushman v. Outwater, 121 Vt. 426, 433, 159 A.2d 89 (1960); City of Montpelier v. National Surety Co., 97 Vt. 111, 119, 122 A. 484 (1923) As the latter case says, the promissor takes the risk within the limits of his undertaking of being able to perform.

In Williams a sub-contractor was entitled to be paid for work done notwithstanding the fact the contractor who had hired him, through no fault of said sub-contractor, had not been paid by the owner.

The Defendant complains of delay in scheduling the work to be performed by WACO. The mer fact that there is a delay in the performance of the building contract will not terminate nor justify rescinding the contract, and, as a general rule, recision of a contract for delay will not be permitted unless time has been made the essence of the contract. 13 Am. Jur.2d

Building and Construction Contracts, §103, Page 98. Time is not ordinarily of the essence of a building contract. Williston on Contracts (3 ed.) Sec. 849, Page 198.

There is no evidence that there was any provision that time was of the essence in Defendant's contract. In May of 1969 at a meeting of personnel from both parties it became apparent that delays in delivery of Italian marble would retard the original time schedule. At that time the Defendant, through Schmitt, realized that the mono-rail scaffolding system originally contemplated would not be appropriate. Shackelford suggested that if the Plaintiff was asking the Defendant to do more than it was prepared to do, WACO should justify its request for additional compensation by facts and figures. No justification was provided by WACO. (Finding 12, J.A. 56)

More time elapsed until two deliveries of Italian marble were at the site. The only scaffolding at the project was that used by the masonry firm sub-contractor, which had been supplied by Albany Ladder and the masons were preparing to leave the job for the winter. Marble setting did not commence until September 10, 1969 using scaffolding left by the masons. (Finding 13, J.A. 56, 57) It is apparent that from the time when WACO concluded that a different kind of scaffolding was needed

than originally contemplated, there was an elapse of many months in which WACO did not deliver any kind of scaffolding and did not submit any justification to VM for modification of WACO's contract. WACO was not ready or willing to perform at the time estimated.

There is no claim that WACO could not perform; WACO's objection is to the improvidently low price of $10,000.00 supplied by Oldenburg.

The Defendant WACO assumes in all its arguments that the Plaintiff VM was in control of the Twin Towers job as if it were the owner or general contractor. It must be kept in mind that VM was only to supply marble facing and MV was neither the owner nor the general contractor. Sawyer and Company, Inc. was the general contractor and VM was only a sub-contractor. WACO, through Oldenburg, had submitted proposals to VM in 1967, on two other building projects which were performed by WACO, one in Houston, Texas and another in Grand Rapids, Michigan,/ and no doubt WACO had supplied scaffolding for many other projects. WACO could have scarcely been overcome by surprise to learn that the Twin Towers project in Albany had been delayed. It is common knowledge that construction projects are often delayed and accommodation

(Finding 2, J.A. 51)

has to be made as the work progresses. There is no evidence or findings cited to show that WACO was unable to perform. Difficulty arose because in April of 1969 WACO's control of its part of the CTT Project was shifted from Oldenburg in Chicago to WACO's Boston Office. (Finding 11, J.A. 54) The Boston Office did not desire to perform.

Italian marble, the delivery of which is said was delayed (Finding 12, J.A. 56) was ordered by the owner, not VM, in March, 1969. In March, 1969 the sub-contract was amended to provide that the Plaintiff would supply Italian marble. The Plaintiff accepted the amendment. (Finding 8, J.A. 54) There is no evidence or findings to show that this amendment was not within the rights of the owner or general contractor or that VM was responsible for the delay in delivering the marble. The Trial Court reasonably concluded from all the circumstances that this was a reasonable and not unusual amendment insufficient to warrant abrogation of the Defendant's contract.

The necessity for use of a different type of staging than originally contemplated by Oldenburg, does not justify the

imposition of a doctrine of "impossibility". WACO was expert on the subject of supplying and erecting staging, not VM and should be charged with knowledge of difficulties that might arise after WACO made its offer to perform. Where a contractor, after informing himself of the nature of the work, undertakes to perform, he impliedly warrants that he is able to overcome the technical difficulties inherent in the project, whatever they are. J. A. Maurer, Inc. vs. United States, 485 F.2d 588, 595 (Ct. Cl., 1973) In the case at bar there were no unpredictable conditions save for a few months delay in the delivery of marble at the construction site. (Conclusion of the Trial Court, J.A. 67)

The case falls within that part of the statement from King vs. Duluty M. N. R. Co., 61 Minn. 482, 63 N.W. 1105, 1107 (1895), quoted by the Trial Court (J.A. 66) wherein it is said that inadequacy of the contract price which is the result of an error in judgment and not of some excusable mistake or facts, is not sufficient to relieve a party from the obligation of his contract.

IV. THERE WAS NO AGREEMENT ON APRIL 10, 1970 MADE IN SUBSTITUTION OF THE EARLIER CONTRACT.

A. Consideration

The Trial Court concluded, contrary to the claims of the Defendant, that there was no agreement made on April 10, 1970 in substitution of the earlier contract, that VM never waived or relinquished its rights under the original contract and that there was no consideration moving from WACO to entitle it to a new agreement. (J.A. 65)

When VM agreed to order scaffolding from WACO and find its own labor to erect the same, it was merely a naked agreement unsupported by consideration to pay for the scaffolding which WACO was already bound by its original contrac to supply and erect for $10,000.00. VM incurred labor costs of $62,422.57 for erecting and dismantling scaffolding because the Defendant had defaulted on its contract. (Finding 20 J.A. 60) This is a cost which VM would not have incurred if WACO had performed its contract. VM obtained scaffolding from WACO on purchase orders after April 10, 1970 when it was clear that WACO was refusing to perform, supply, erect and dismantle scaffolding, for $10,000.00 and VM was under immediate pressure to perform

The second case relied upon by VM is the Bachli case,

its contract with the general contractor which was to apply the marble facing. (Finding 17, J.A. 58, 59)

In order to make a new contract on April 10, 1970 Defendant WACO would have to give some consideration for it. Defendart WACO in its Brief (Page 51-62) has not pointed out any finding or any evidence showing that WACO gave anything. As the Trial Court pointed out in Footnote 6 to its Finding of Fact and Conclusions (J.A. 70);

> "There is scant, if any consideration, in the discharge of a contract for materials and labor at the agreed price of $10,000.00 in exchange for an agreement to pay open end purchase orders totalling $77,073.27 plus labor costs."

The procedure adopted on April 10, 1970 whereby WACO would supply scaffolding and VM would obtain its own labor was a mere accommodation to get the job done. As a result of it WACO gave nothing and did only part of what it was already bound to do (supply scaffolding) under the original contract. (J.A.65) There being no consideration moving from WACO, WACO cannot recover the cost of renting the scaffolding. Fommeyer vs. L & R Construction Company, 261 F.2d 879, 882 (3d Cir., 1958); 13 Am.Jur.2d, Building and Construction Contracts, §5, Page 9.

accepted by another under the facts and circumstances set

The Defendant WACO did nothing more than was its duty to do without additional reward. McGovern vs. City of New York, 234 N.Y. 337, 138 N.E. 26, 30 (1923) (Cardozo, J.) (Findings of Fact and Conclusions, J.A. 65)

After April 10, 1970 VM issued purchase orders to WACO in order to obtain scaffolding as needed. Under this procedure VM at first, prior to July 11, 1970, received an invoice from WACO in the amount of $3,187.27 which VM paid. This was a routine payment because purchase orders had been issued to WACO on other jobs. Thereafter VM's house counsel Ray Keyser, Jr. issued orders not to pay any further invoices until the matter was resolved. (Tr. 206-208)

B. Coercion

Defendant devotes part of its Brief (Page 51-57) to attacking the following conclusion of the Trial Court:

> "In the press of the demands of the general contractor for the Plaintiff to resume the setting of the marble in April, 1970, the Defendant's new representative (Moritz) returned to the construction site and coerced a better bargain." (J.A. 67)

But this is surplusage. Absent coercion, there is no demonstration

support VM's assertion insofar as it pertains to dealings with

of any consideration moving from WACO for a new contract.

Had there been a finding that VM had made a new promise to pay a new price for renting scaffolding, which there was not, such promise could be set aside as having been induced by coercion. There is no finding or any conclusion of evidence that VM made any new promise.

Before the meeting of April 10, 1970, Moritz, for WACO, agreed to meet with Richardson, for VM, provided Richardson assured Moritz there would be no discussion about WACO's refusal to perform according to the original quotation of $10,000.00. (Finding 17, J.A. 58) Coercion is cumulative and tends to show that there was no intent on the part of VM to abandon its original contract. (Annotation 12 A.L.R.2d 78, 111, §7) But there was no intent to abandon the original contract because it was not even discussed, at Moritz' request.

There was in fact coercion because as set out in Finding 17 (J.A. 58, 59) on Moritz' own statement, VM was "really over a barrel on this thing in the total concept". Richardson had said that "he had to have Moritz help". Richardson "was almost pleading on the telephone conversation in early April".

The fact that a finding is based on a Pre-Trial

deposition bears only on the manner in which it will be regarded on appeal. It cannot be disregarded. 5A Moore's Federal Practice, §52.04, Page 2677-2680; Heim vs. Universal Pictures Co., 154 F.2d 480, 491 (2d Cir. 1946)

Having erroneously stated Waco's claim, VM's brief

V. THERE WAS NO ERROR IN FAILURE OF THE TRIAL COURT TO APPLY A DOCTRINE OF ESTOPPEL.

The Trial Court concluded; "Any promise of the Plaintiff to pay under the new term enacted by the Defendant at the meeting on April 10, 1970, is unenforceable for want of competent consideration". (J.A. 65)

The Defendant now says that VM should pay for the scaffolding rented on VM's purchase orders on a doctrine of promissory estoppel (Df's. Brief, Page 68) but the authorities cited by the Defendant (Df's. Brief, Page 64) do not so hold. An argument that estoppel should be applied ignores the whole history of the case prior to April 10, 1970.

The principle invoked is that a party (VM) will not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits and if affirming it in part by repudiating or avoiding its obligations or burdens (the obligation to pay) 31 C.J.S., Estoppel, §110, (2). But it is the essence of the findings and conclusions of the Court that VM had no obligation to pay because WACO did no more than it was obligated to do under its original contract, in fact, less. (J.A.65)

together with Richardson's earlier representations to

In Overlock vs. Central Vermont Public Service Corp., 126 Vt. 549, 554, 237 A.2d 356, 359 (1967) there was no prior contract between the parties. There the Court found that an offer to make a gift, such as an unexecuted offer by third parties to collect gift funds for the Plaintiff, created no enforceable rights. The essential detrimental reliance was lacking. And so, here, WACO has not suffered a detriment because it did no more than it was bound to do under its original contract.

In Dutch Hill Inn, Inc. vs. Patten, 131 Vt. 187, 193 303 A.2d 811, 815 (1973) the Court said:

> "The test of estoppel in this jurisdiction is whether in all the circumstances of the case, conscience and duty of honest dealing should deny one the right to repudiate the consequences of his representations or conduct."

Absent any prior contract between the parties acceptance by VM of scaffolding and refusal to pay for the same would be unjust but here findings and conclusion of the Court show that VM will pay, but only up to the $10,000.00 agreed upon in the original contract.

VI. THE COURT DID NOT ERR IN DENYING WACO'S MOTION FOR A NEW TRIAL.

On April 26, 1974 a Hearing was had before Honorable James S. Holden on an application under Rule 59 by WACO as to which there is a separate transcript referred to by the Defendant as "H.T.R.". Defendant claims that the Trial Court should have reopened the trial to take additional evidence in regard to the claim that VM "over extended its scaffolding requirement" (Df.'s Brief, Page 69) Defendant offered to present "new evidence" with respect to extra materials ordered by Vermont Marble Company (H.T.R. 3). It is not claimed that this was newly discovered evidence but evidence omitted from the trial.

Defendant submits no authorities to show that it was error as a matter of law to deny this Motion or that the Trial Court did not exercise sound discretion.

Although the Court would have greater freedom in taking additional testimony in a Court action than in a jury trial (6A Moore's Federal Practice, §59.07, Page 59-97), there is no authority cited to show that it was error not to reopen the trial.

CONCLUSION

The Defendant-Appellant WACO has not demonstrated that the Findings of Fact are clearly erroneous. The judgment is supported by the Findings and should be affirmed.

Dated this 12th day of December, 1974.

By _____

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